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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947.

No. 773

WILLIAM SINNOTT and REUBEN SCHULER,
Petitioners,

vs.

STATE OF SOUTH DAKOTA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

and

BRIEF IN SUPPORT THEREOF.

HERBERT S. THATCHER
and
ALFRED G. GOLDBERG,
736 Bowen Building,
821 Fifteenth Street, N. W.,
Washington 5, D. C.,
Attorneys for Petitioners.

DAVID PREVIANT and
SAUL COOPER,
511 Warner Theatre Building,
212 West Wisconsin Avenue,
Milwaukee 3, Wisconsin,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Justices of the Supreme Court of the United States:

The above named Petitioners respectfully petition for a Writ of Certiorari to review the decision of the Supreme Court of South Dakota, 30 N. W. 2nd 455, rendered December 30, 1947, affirming a judgment of the Circuit Court of Pennington County, South Dakota. (The decision of the South Dakota Supreme Court may be found at pages 230-237 of the printed Record.)

SUMMARY STATEMENT OF MATTER INVOLVED.

[Record references are to the Transcript of Record as printed by the Clerk of the United States Supreme Court, pursuant to Rule 38 (7) of this Court.]

The Petitioners were charged with conspiracy on two counts. They were acquitted on the first count (R. 197), which accused them of committing a crime of conspiracy, in that they conspired, combined and agreed to commit assault and battery on Porter B. Buckingham and Ralph Hancock, and pursuant to such conspiracy Reuben Schuler committed assault and battery on November 26, 1945, at the Town of Wall, South Dakota, in that he did strike, beat, kick and wound Porter B. Buckingham and Ralph Hancock (R. 203).

The second count, of which they were found guilty, charged that the Petitioners committed the crime of conspiracy to intimidate employees in that they conspired to prevent the hired workmen of the Buckingham Transportation Company from performing their work, in that they did at the Town of Wall, South Dakota, on the 26th day of November, 1945, wrongfully, wilfully and unlawfully commit assault and battery on Porter B. Buckingham and Ralph Hancock (R. 203).

This case is unique insofar as it involves, among other matters, a criminal investigation in the guise of an adverse examination in civil proceedings, which examination was an unconstitutional invasion of defendant's rights.

On November 26, 1945, the employees of the Buckingham Transportation Company, hereinafter called the "Employer" or the "Company," were on strike concerning hours, wages and working conditions (R. 9, 10). An agreement with the Company was made by the employees before they went out on strike that any freight in transit was to be brought to the docks of the nearest company terminals, and that deliveries would be made in Rapid City until docks were cleared of any freight which had been in transit (R. 73, 74, 75).

The morning of the 26th of November, the Company was preparing to start out with a truck in violation of the strike and of the agreement between the Company and the Local Union previously entered into (R. 77, 78, 80). There was considerable tension between the Employer and employees.

Glenn Buckingham, one of the Employers, approached Sinnott, Schuler, and another, who were all sitting in Sinnott's car outside the company's place of business (R. 78). Buckingham said he would make deliveries that day (R. 78), that if another trucking company could operate and make money so could he (R. 79). He said that if the union interfered in any way with his men or his operations, Buckingham would come into their homes if necessary and smash their furniture and homes; and he had the backing of the City Police and all the businessmen in Rapid City to do that (R. 12, 79, 80). Upon Schuler saying that Buckingham was "talking silly", Buckingham said that the statement applied to him too (R. 12) and that the truck would carry meat hooks (R. 80). A truck did go out on a run that morning (R. 80).

Later in the day, the Petitioner, Sinnott, was informed that a truck driven by one of the union operators had gone east during the evening of the 26th to meet a truck operated by the Wilson Transportation Company of Sioux Falls, South Dakota (R. 80). At about 6 P. M. (R. 88, 107) Sinnott, Business Agent of the union representing the striking employees (R. 77), asked Petitioner, Schuler, Shop Steward (R. 77), to take one or two good conscientious fellows that he thought could persuade non-striking employees who were driving the truck for the Company to discontinue driving the truck until a settlement of the strike had been reached (R. 86, 107, 108). Sinnott did not tell Schuler who to take with him, nor did Schuler tell him whom he was taking (R. 88, 108). Schuler, with

several other members, drove east of Rapid City with the intention of meeting the truck and talking to the union member regarding his activity in the strike (R. 109). Any previous attempt at conversation had been ineffectual inasmuch as the non-striking union member had been either on the property of the company or in the presence of the employer, and for that reason it was felt best to talk with the non-striking employee outside of Rapid City (R. 96, 101).

In the Town of Wall, South Dakota, the defendant, Schuler, found the company truck in question (R. 111, 112). The area was well lighted (R. 112). Schuler walked over to talk to the operators, Porter Buckingham and Ralph Hancock, who were employees of the company (R. 114). On Schuler's approaching the operators, Buckingham turned around and struck him (R. 115). Schuler then retaliated (R. 115). After the fight the men returned to Rapid City (R. 118). The following day Schuler and others were arrested for rioting, and a number of civil actions were started against both Petitioners (R. 92, 119). Both Petitioners, along with others, were examined adversely in the civil case of **Porter Buckingham v. William Sinnott et al.**, in the Circuit Court of Pennington County, Seventh Judicial Circuit (R. 92). Pursuant to an order of the Court, they were sworn and testified (R. 185, 186). The State's Attorney was present at the Adverse Examination at all times, unknown to the Appellants or their counsel (R. 186).

After the civil proceedings above described, Schuler and other employees of the company were arrested, charged with the crime of riot on the following day (R. 119). They were tried in Pennington County Circuit Court, South Dakota, after the civil proceedings above described (R. 50). Subsequently, Sinnott and Schuler were arrested on the information, the basis for these proceedings.

The plea of "not guilty" was entered to both counts of the information, and the case was tried beginning May 20, 1946. The Motion to Quash the information was filed by Petitioner Sinnott, because he was ordered to appear and testify concerning the facts forming the basis of the crime with which he was charged (R. 184, 185). Motion was denied.

During the trial the prosecution submitted in evidence as part of its case testimony of Sinnott taken at the Adverse Examination in the civil action (R. 54, 55), and also testimony taken in the criminal case, in which Petitioner Schuler was charged with riot (R. 52). This evidence was admitted over the objection of Counsel for the Petitioners (R. 51, 53). The Petitioners moved for a Directed Verdict after the State had rested its case (R. 69), and after trial (R. 175). Both motions were denied (R. 70, 175). A verdict of "Guilty" of Conspiracy, as charged in Count 2 of the information, was returned against the Petitioners (R. 197). Motions in arrest of judgment were denied and judgment was entered on the verdict on June 10, 1946, whereby the Court ordered the Petitioner Sinnott to be sentenced to the South Dakota Penitentiary at Sioux Falls, South Dakota, for a term of three years, said term to begin upon delivery to the Warden of that institution, and to pay a fine of $2,000.00, and that at the completion of said sentence he be committed to the Pennington County Jail until the fine was paid, the fine to be served at the rate of $2.00 per day (R. 198). Judgment was entered against Reuben Schuler ordering him to pay a fine of $1,000.00, and that he be sentenced to the South Dakota Penitentiary at Sioux Falls, South Dakota, for a period of one year, said Penitentiary sentence to be suspended on condition that said fine be paid, and that he abide by the laws of the State of South Dakota in the future. And in the event that he fails to pay said fine he be committed to the Pen-

nington County Jail until the fine is paid at the rate of $2.00 per day (R. 199).

Appeal was taken to the South Dakota Supreme Court on June 14, 1946. That Court affirmed the Judgment on December 30, 1947 (R. 230).

STATEMENT AS TO JURISDICTION.

This case is one over which the Court has jurisdiction under the provisions of the Act of Congress of February 13, 1925, Section 237-B, 28 U. S. C. A., Section 344-b, giving jurisdiction to this Court:

> "to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by appeal any cause wherein a final judgment or decree has been rendered and passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of being repugnant to the Constitution or laws of the United States; or where any title, right, privilege or immunity is especially set up or claimed by either party under the Constitution. * * *"

This case is one in which the validity of the Statutes of the State of South Dakota, to-wit: Section 1 of Chapter 45, Session Laws of South Dakota, 1941, and Section 13.1824 South Dakota Code of 1939, and an information, proceedings and judgment based thereon, is drawn in question upon the ground that such Statutes, information, proceedings and judgment on their face, and as construed in the opinion and judgment of the Supreme Court of the State of South Dakota, are repugnant to the First and Fifth Amendments and Section 1 of the Fourteenth Amend-

ment to the Constitution of the United States, as depriving Petitioners of freedom of speech, compelling petitioners to be witnesses against themselves, abridging the privileges and immunities of citizens of the United States, depriving them of life, liberty and property without due process of law, and denying to the Petitioners the equal protection of the laws. The decision of the South Dakota Supreme Court was in favor of the validity of the Statutes and Judgment, and against the denial of rights, privileges, and immunities of citizens under the United States Constitution. The Supreme Court of the State of South Dakota rendered its decision herein on December 30, 1947. Said opinion of the Supreme Court of South Dakota, the last resort in all causes in said state, is reported in S. D. 30 N. W. (2nd) 455 (Advance Sheets). On March ..., 1948 Mr. Justice Rutledge, by appropriate order, extending the time for filing of this Petition until the 30th day of April, 1948 (R. 238, 239).

Your Petitioners argued before the Circuit Court of Pennington County and before the Supreme Court of the State of South Dakota that the judgment issued by such court, and any Statute upon which said judgment was purportedly based, were unconstitutional and void, and of no effect whatsoever, because they were repugnant to the First and Fifth Amendments and Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they deprived Petitioners of freedom of speech, compelled petitioners to be witnesses against themselves, abridged the privileges and immunities of citizens of the United States, and deprived them of life, liberty and property without due process of law, and further deprived Petitioners of the equal protection of the laws.

The Federal question of whether the South Dakota Statutes in question and the information, proceedings and

judgment purportedly based thereon violated the Constitution of the United States thus was raised before every Tribunal before which argument was heard. The Supreme Court of the State of South Dakota specifically held that neither the South Dakota Statutes nor the judgment as construing said Statutes deprives the Petitioners of any rights guaranteed under the provisions of the Constitution of the United States. This can be seen from the following language taken from the court's opinion:

> "We think that the evidence on behalf of the State was sufficient to connect defendants with a plan or scheme to prevent by coercion such employees from working."
>
> * * * * * * *
>
> "Whether or not the privilege is claimed during examination, the defendant in such instance (where a person is called as a witness in a judicial inquiry which has for its primary purpose the determination of his guilt or innocence of an offense) may move at the proper time and have the information quashed * * *. There is no indication that the civil action in which Appellant testified was brought to secure evidence of his guilt of a crime." (Parenthesis ours.)

Thus the South Dakota Supreme Court has taken the position that this adverse examination in the civil proceedings is not an inquiry which has for its primary purpose the determination of the guilt or innocence of an offense, and the introduction of testimony of a defendant obtained at such a proceeding is not an invasion of his constitutional rights, nor does the State Statute strike at the exercise of free speech, and that the question of the violation of these constitutional guarantees of the defendants claimed to have been breached by the State should be determined adversely to the Petitioners.

Some of the cases relied on by Petitioners in the Courts below are:

1. **Boyd v. United States, 116 U. S. 616;**
2. **Counselman v. Hitchcock, 142 U. S. 547;**
3. **State v. Smith, 228 N. W. 240, 56 S. D. 238;**
4. **State v. Sly, 257 N. W. 113, 63 S. D. 162;**
5. **People v. Green, 13 N. E. 2nd 278, 368 Ill. 242;**
6. **Thornhill v. State of Alabama, 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093.**

A copy of the entire record in this case, as certified to be true and correct by the Clerk of the Supreme Court of the State of South Dakota, is hereby furnished and made a part of this application, in compliance with Rule 38, Paragraph 1 of the rules of this Court.

STATUTES INVOLVED.

Section 1, Chapter 45, Session Laws of South Dakota, 1941:

> "If two or more persons conspire, either to commit any offense against the State of South Dakota, or to defraud the State of South Dakota, or any County, township, school district or municipal corporation in any manner or for any purpose, and one or more of such parties, do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than Ten Thousand Dollars ($10,000.00), or be imprisoned in the State Penitentiary for not more than Five (5) years, or both. * * *"

Section 13.1824, South Dakota Code 1939:

> "Intimidating employees; misdemeanor. Every person who by any use of force, threats, or intimidation prevents or endeavors to prevent any hired foreman,

journeyman, workman, laborer, servant, or other person employed by another from continuing or performing his work or from accepting any new work or employment, or induces such hired person to relinquish his work or employment, or to return any work he has in hand before it is finished, is guilty of a misdemeanor."

QUESTIONS PRESENTED.

The following Federal question raised and argued before the Supreme Court of the State of South Dakota is also presented here:

1. Are the information, proceedings, and judgment herein founded on an inquiry to determine the Petitioners' guilt or innocence of an offense, which inquiry compelled the Petitioners to be witnesses against themselves, deprived them of life, liberty or property without due process of law, or denied them equal protection of the laws, in contravention of the provisions of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Are the State Statutes, as construed by the judgment of the State Court, void because they abridge Petitioners' right to freedom of speech, as guaranteed in the First and Fourteenth Amendments to the United States Constitution?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

The affirmance of the judgment by the Supreme Court of the State of South Dakota is in conflict with the decisions of this Honorable Court in **Boyd v. United States,** 116 U. S. 616; **Counselman v. Hitchcock,** 142 U. S. 547; **State v. Smith,** 228 N. W. 240, 56 S. D. 238; **State v. Sly,** 257 N. W. 113, 63 S. D. 162; **People v. Green,** 13 N. E. 2nd 278, 368 Ill.

242, and **Thornhill v. State of Alabama,** 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093.

The defendants have been denied their constitutional rights against self-incrimination by the device of being examined adversely in a civil suit for damages, by the filing of an information based on such adverse examination, and by permitting at the trial the introduction of testimony taken at the adverse examination, and by entering a judgment based on proceedings which invaded the constitutional guarantees of the Petitioners. The question of construing a State Statute so as to prevent peaceful persuasion is also here presented.

PRAYER FOR WRIT.

Wherefore, your Petitioners pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Clerk of the Supreme Court of the State of South Dakota commanding that Court to certify and send to this Court for review and determination on a day certain to be therein named, a full and complete transcript of the record, and all proceedings in the case entitled **"State of South Dakota v. William Sinnott and Reuben Schuler,"** and that the judgment of the Supreme Court of the State of South Dakota may be reviewed by this Honorable Court, and that your Petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and meet, and your Petitioners will ever pray.

HERBERT S. THATCHER and
ALFRED G. GOLDBERG,
Attorneys for Petitioners.

DAVID PREVIANT and
SAUL COOPER,
Of Counsel.

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OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of South Dakota is reported in 30 N. W. (2nd) 455 (Advance Sheets).

JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this Court is Title 28, U. S. C. A., Section 344-b [Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925].

As seen in the jurisdictional statement in the foregoing petition, constitutional objections to the information, proceedings, and judgment were raised and argued before every tribunal, including the Circuit Court of Pennington County and the Supreme Court of the State of South Dakota, the court of last resort for all causes in the State. The constitutional objections were discussed and passed upon by the Supreme Court of the State of South Dakota, which court determined that such objections were not available to Petitioners, and that the information, proceedings, the legislation, and the judgment did not invade any constitutional rights.

STATEMENT OF THE CASE.

A summary statement of the case appears in the Petition for Writ of Certiorari, which, in the interest of brevity, is incorporated herein by reference.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of South Dakota erred in the following respect:

In affirming the judgment of conviction of the Circuit Court of Pennington County, South Dakota, which judgment compelled the Petitioners to be witnesses against themselves, abridged the privileges and immunities of the citizens of the United States, deprived them of life, liberty and property without due process of law, denied to the Petitioners equal protection of the laws, and deprived Petitioners of freedom of speech.

ARGUMENT.

I.

The Petitioners Were Denied Their Constitutional Rights Against Self-Incrimination by Being Called to Testify at the Adverse Examination in the Civil Proceedings.

A. The right against self-incrimination is fundamental and is to be closely guarded.

The right to be protected against self-incrimination has been one of the fundamental pillars of our constitution ever since its ratification, and has been closely guarded by the courts of the land ever since their founding. The Fifth Amendment of the United States Constitution provides that no person

> "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law. * * *"

The Fourteenth Amendment to the United States Constitution provides:

> "nor shall any State deprive any person of life, liberty or property without due process of law."

That these rights have had the utmost importance placed upon them, and that the nature of their importance is such that courts must search them out to protect them has been decreed by the Supreme Court of the United States in a long line of cases.

> "* * * Any compulsory discovery by exorting the party's oath * * * is contrary to the principles of a free government. It is abhorrent * * * to the instincts of an American. It may suit the purposes of despotic

> power; but it cannot abide the pure atmosphere of political liberty and personal freedom * * * It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure."

Boyd v. United States, 116 U. S. 616 at 635; **Counselman v. Hitchcock,** 142 U. S. 547; **Gouled v. United States,** 255 U. S. 298; **Agnello v. United States,** 269 U. S. 20; **Weeks v. United States,** 232 U. S. 383. And to leave no doubt as to their indispensability to the freedoms forged by the Constitutional mandate, the courts have proclaimed that these tenets shall receive a broad construction and shall be liberally interpreted because encroachments on the constitutional right can only be obviated by adhering to the rule of liberal construction. **Boyd v. United States,** supra; **State v. Smith,** 228 N. W. 240, 56 S. D. 238; **State v. Hall,** 238 N. W. 303, 59 S. D. 98; **Counselman v. Hitchcock,** supra; **Taylor v. Forbes,** 143 N. Y. 219, 38 N. E. 303; **Ex Parte Senior,** 37 Fla. 1, 32 L. R. A. 133; **State v. Gardner,** 92 N. W. 529, 88 Mo. 130; **U. S. v. Edgerton,** 80 Fed. 374.

B. **Though the proceeding may be civil in form, it is nevertheless criminal in nature.**

It is immaterial whether the proceeding in which the interrogation takes place is civil or criminal. As long as the one being questioned may be subjected to a criminal case the constitutional cloak avails. Back in 1886 this court in **Boyd v. United States,** supra, held to this principle:

> "We are clearly of opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by

him, though they may be civil in form, are in their nature criminal."

And in **Counselman v. Hitchcock**, supra, it was said:

> "The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard."

See also **McCarthy v. Arndstein**, 266 U. S. 34; **Karel v. Conlan**, 155 Wis. 221; **Hawley v. Wallace**, 163 N. W. 127, 137 Mo. 183.

To hold otherwise would be to emasculate the essential principle of the rule, for the commission of nearly every crime carries with it a civil liability. A person suspected of a crime could be proceeded against civilly and compelled to disclose the very facts essential to a conviction leaving him practically without any privilege whatever.

C. **The self-incrimination rule, as applied to a party, is distinguished from the rule of self-incrimination as applied to a witness.**

The right against self-incrimination as it applies to a party is different from its application to a witness. As a witness, one may always be subpoenaed, sworn and interrogated, and if he desires to claim his privilege, he must assert it; not claiming it he is presumed to waive it. **As to a party, however, the mere calling—the mere fact that he is under subpoena—is coercion and compels him to be a witness against himself thus invoking the constitutional privilege.**

In resolving this proposition, the State of South Dakota has declared in crystal-clear fashion. In a textbook dis-

cussion of the guaranty against self-incrimination, the South Dakota Supreme Court has affirmed that,

> "A fair interpretation of the constitutional provision and the common-law privilege upon which it is based requires the holding that a person may not be subjected to inquisition or called as a witness by the state in any judicial inquiry which has for its primary object the determination of that person's guilt or innocence of a given offense. In such investigation that person is, in actual fact, a party as distinguished from a witness, and his constitutional rights must be determined according to the fact regardless of the form of the proceeding."

The South Dakota Supreme Court in the Smith Case then went on to quote with approval from **People v. Bermel,** 91 Misc. Reports 356, 128 N. W. Sup. 524.,

> "But where, on the other hand, the investigation before the grand jury is a proceeding against him, or being ostensibly a general investigation, is, in fact, as shown by the circumstances and evidence, a proceeding against him, then the defendant's constitutional right is violated if he be subpoenaed before the grand jury, sworn and questioned, though he makes no claim of privilege or exemption. Briefly stated, if the person testifying is a mere witness, he must claim his privilege on the ground that his answers will incriminate him, **whereas, if he be in fact the party proceeded against, he cannot be subpoenaed and sworn, even though he claim no privilege. People v. Gillette,** 126 App. Div. 665, 111 N. Y. S. 133; **People ex rel. Hummel v. Davy,** 105 App. Div. 598, 94 N. Y. S. 1037; **Counselman v. Hitchoock,** 142 U. S. 547, 12 S. Ct. 195, 35 L. Ed. 1110; **People v. Singer,** 18 Abb. N. C. (N. Y.) 96; **People v. Haines (Gen. Sess.),** 1 N. Y. S. 55; **State**

v. Froiseth, 16 Minn. 296 (Gil. 260); **State v. Gardner**, 88 Minn. 130, 92 N. W. 529. **The party testifying may, in fact, be the defendant or the party proceeded against, and not a mere witness, although he be not under arrest or openly charged with the crime or proceeded against in name. The title of the proceeding cannot determine rights, as constitutional protection is one of substance and not of form. If the person examined before the grand jury be in fact the one aimed at, sought for, and charged with the crime, the title of the proceeding cannot make his examination legal.**" (Emphasis ours.) See **State v. Smith**, supra.

Adopting the doctrine established in the **Smith Case** and elaborating on the same principle, the South Dakota Supreme Court said in **State ex rel. Poach v. Sly**, 63 S. D. 162, 257 N. W. 113:

> "Under our constitutional provisions, any person testifying anywhere, at any time, in any proceeding, is exempt from answering questions or furnishing testimony which would tend to incriminate him save only in cases where immunity is validly granted to persons so testifying. With reference to the person charged with crime, however, as pointed out in the Smith case, he is not only exempt from answering incriminating questions, **but is exempt from being sworn and interrogated with reference to the matter at all save only 'at his own request but not otherwise'.** This distinction was emphasized in **State v. Hall** (1931), 59 S. D. 98, 238 N. W. 302." (Emphasis ours.)
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> * * * * * * *
>
> "If X is charged with crime, there is no prosecuting officer in this state who would imagine for a single minute that he had any right to subpoena X and interrogate him in any manner whatsoever, either before a committing magistrate, before a grand jury, or upon

the trial. A legislative enactment purporting to authorize the prosecutor to subpoena and interrogate the accused either upon preliminary examination, before the grand jury, or at the trial would be an unconstitutional invasion of the rights of the accused beyond possibility of question. **Neither the Legislature nor the prosecutor can lawfully invade the constitutional rights of the accused by indirection any more than they could directly.** The stage of the proceedings at which the unlawful interrogation is conducted is entirely immaterial. The Legislature cannot render the unconstitutional interrogation of the accused constitutional merely by setting up a new and additional piece of procedural machinery prior in point of time to the preliminary examination before the committing magistrate or the hearing before the grand jury, christening such machinery an 'investigation in aid of prosecution,' and providing that the unlawful interrogation shall take place therein." (Emphasis ours.)

Wigmore on Evidence, Third Edition, which is quoted in **State v. Smith**, supra, authoritatively on the proposition says as follows in Volume 8, at page 392:

"Paragraph 2268. For the party defendant in a criminal case, the privilege permits him to refuse answering any question whatever in the cause, on the general principle that it 'tends to incriminate'."

"(a) This being so, the prosecution could nevertheless on principle have a right at least to call him to be sworn, because, as with an ordinary witness, it could not be know beforehand whether he would exercise his privilege. **But no court seems ever to have sanctioned this application of the principle.** This result may be rested on several considerations: (1) Historically, the privilege existed long before the abolition of the accused's disqualification: hence for those

statutory changes the accused could not testify even if he were willing; thus to call him would be useless, and the negative practice became fixed. (2) Under the modern statutory competency of the accused, if he should choose to testify when the time comes for putting in his case, the prosecution may on his cross-examination put the questions which it could have put on calling him earlier, and thus the prosecution's opportunity to find whether he will exercise his privilege is practically obtained. (3) Even though the prosecution might technically be entitled to that opportunity at the earlier stage, still the exercise of his technical right need hardly be conceded, since the procedure could only have, as its chief effect, the emphasizing of his refusal should he refuse, and thus the indirect suggestion of that inference against him from which he is protected by another aspect of the principle. (4) By the express tenor, in most jurisdictions, of the statute qualifying the accused, he is declared to be a competent witness 'at his own reqest, but not otherwise'. Whether this form of words was chosen with a view to its present bearing can only be surmised; but its evident effect is to forbid the calling of the accused by the prosecution."

In the **Smith Case** the court said that no case had been called to the Court's attention where the defendant had been called as a witness in a strictly criminal case. Said that court:

> "We could not expect one. Such a course would be clearly wrong."

Other jurisdictions have taken the same position.

In **People v. Ferola,** 109 N. E. 500, the court ruled:

> "It is the calling of the accused as a witness not merely the administering of the oath, which virtually compels him to be a witness against himself."

See also **Mulloney v. United States**, 79 Fed. (2nd) 567; **In the Matter of Greene**, 86 Mo. Appellate 216; **Ex parte Sauls**, 78 S. W. 1073; **Town Council v. Owens**, 61 S. C. 22, 39 S. E. 184; **Blair v. Com.**, 166 Va. 715, 185 S. E. 900.

D. **The civil adverse examination was a proceeding to determine guilt or innocence of Petitioners.**

The adverse examination was a proceeding to determine whether or not the Petitioners were guilty of the offenses with which they were subsequently charged. The entire pattern of events concerning the adverse examinations—the method of conducting them, the investigation into all of the facts which subsequently were the basis for the present charges and information, the presence of Mr. J. H. Bottum, Jr., the State's Attorney of Pennington County, who signed and filed the original complaint charging the Petitioners with conspiracy in the Court Room at the time of the Petitioners' adverse examinations (R. 185-186), the fact that the civil suits at which the adverse examinations were taken were dismissed without consideration (R. 153) —all point to the fact that this was a proceeding, the primary purpose of which was to determine the Petitioners' guilt or innocence of the offenses.

That the adverse examination was conducted for this purpose may be observed when the facts herein are compared with the following language taken from the **Sly Case:**

> "The entire course and conduct of the John Doe investigation and the whole trend of examination of the witnesses subpoenaed thereat demonstrate that relator was suspected; that no one else was (unless perhaps his friend Perry as an accomplice); and that the purpose and intention of the investigation was to establish or help to establish his guilt. It is incontrovertible on this record that relator was, again

quoting the New York Court, 'in fact the one aimed at, sought for.' To say, under these circumstances, that to subpoena and interrogate relator was not to invade his constitutional rights merely because formal accusation had not yet been filed against him or because the proceeding was nominally entitled as against John Doe would be sheer equivocation."

Boyd v. United States, supra;
Counselman v. Hitchcock, supra;
State v. Smith, supra;
People v. Bermel, supra.

The requirement that both defendants attend the adverse examination was prejudicial. Sinnott was required to appear, take oath, testify, and was not advised of his constitutional rights, and, therefore, did not assert them. Schuler was also required to appear, take oath, and testify.

II.

The Examination Being a Proceeding to Determine the Guilt or Innocence of the Petitioners, the Information, Trial, Judgment, and All Matters Which Occurred in This Case Subsequent to the Adverse Examination in the Civil Lawsuit Were Null and Void.

The Petitioner, Sinnott, filed a motion to quash the information as to him. The motion was grounded on the premise that the information was the result of the adverse examination, and such examination was an invasion of the Petitioner's constitutional rights. Motion was denied. The Courts have said that:

"a subsequent indictment or information charging the commission of the crime concerning which he was interrogated and based, or possibly based, in whole or in part, upon such unconstitutional interrogation, is

invalid if objected to and should be quashed upon motion. This appears to be the clear weight of authority and seems to us the only sound rule. It is an undeserved gratuity to the accused if he is guilty and it is, of course, unfortunate in any individual case that if guilty, he should receive it. **The rule is required as a matter of sound public policy and as the only effective means of preserving the constitutional guarantees.** It is somewhat analogous in principle to the rule in this and many other states and in the federal courts preventing the use of evidence obtained by illegal search and seizure. Cf., **State v. Gooder** (1930), 57 S. D. 619, 234 N. W. 610. The only effective way to prevent unconstitutional interrogation of a person accused or **definitely suspected of crime** and the only way to prevent abuse of that statute **is to let it be known to magistrates and prosecutors that such unconstitutional interrogation cannot be followed by successful prosecution based thereon or connected therewith. Nor is it sufficient answer that there is evidence other than that given by the accused in the course of his unlawful interrogation ample to justify the filing of the information or indictment.** That answer could be made in practically every case. Indeed it would frequently happen that the interrogation of the accused would open up 'leads' to other and extraneous sources of information whence ample evidence might be obtained to justify the prosecution. * * * **However guilty the accused may be, and however much more difficult it may render his trial and conviction, his constitutional rights must be respected.**" (Emphasis ours.)

State v. Sly, supra.

The opinion in the **Smith Case** quotes the following with approval from **State v. Froiseth,** 16 Minn. 296:

"'If in fact the defendant was compelled to be a witness against himself before the grand jury it was in violation of his personal right guaranteed to him by the constitution of the state which provides that no person in a criminal case shall be compelled to be a witness against himself. If such were the case, it was the imperative duty of the court to grant his motion to quash the indictment, for courts have no discretion in the matter of giving effect to constitutional guarantees.' **State v. Froiseth**, 16 Minn. 296 (Gil. 260); **Boyd v. U. S.**, 116 U. S. 616 (65 S. Ct. 524), 29 L. Ed. 746; **Counselman v. Hitchcock**, supra; **U. S. v. Edgerton** (D. C.), 80 F. 374."

And later in the opinion we find:

"**But if a defendant in a criminal case seeks to raise,** as does the defendant here, the general proposition that his constitutional rights were invaded by the very fact that he was subpoenaed and required to testify in a John Doe proceeding, **whether such testimony is offered against him at his subsequent trial or not,** we think he can only do so by proper motion to quash the indictment or information on that ground." (Emphasis ours.)

Both defendants, Sinnott and Schuler, preserved their objection to the Constitutional invasion and made motions for a directed verdict (R. 184) and in arrest of judgment (R. 225) listing among other reasons therefor the infringement of the constitutional rights. These motions were all denied.

The Invalidity of the Information May Be Questioned at Any Stage in the Proceedings.

Although the defendant Schuler prior to trial failed to raise objections as to the validity of the information on

the ground that the information was based on an illegal adverse examination and testimony obtained therein, the defect is of such fundamental character as to make the information wholly invalid and is not subject to waiver by the accused. **People v. Gray**, 261 Ill. 140, 130 N. E. 552. The jurisdiction of the trial court is based on the information which brings the charge before it. If the information is void because the adverse examination upon which it is grounded is illegal, then the court had no jurisdiction over the persons before it, and error as to jurisdiction is never waived.

Further, this matter may even be attacked for the first time on application to the Supreme Court because the issue is so vital that it goes to the very crux of the court's power. See **People v. Green**, 368 Ill. 242, 13 N. E. (2nd) 278, 115 A. L. R. 348, in which it was reported:

> "It is a rule, even in civil pleading, that if a complaint fails to state a cause of action the defect may be reached and the question raised on writ of error, even if there has never been any demurrer, motion for a new trial, or motion in arrest of judgment. **Oulvey v. Converse**, 326 Ill. 226, 157 N. E. 245; **Chicago & Eastern Illinois Railroad Co. v. Hines**, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515. The same rule applies to criminal pleadings, and if an indictment is void the error may be reached in this court even though there has been a plea of guilty in the trial court. **Klawanski v. People**, 218 Ill. 481, 75 N. E. 1028. In such case it is error to overrule a motion in arrest of judgment and, on review, the proper order is one of reversal without remanding. **People v. Martin**, 314 Ill. 110, 145 N. E. 395; **People v. Barnes**, 314 Ill. 140, 145 N. E. 391. In the case of **People v. Minto**, 318 Ill. 293, 149 N. E. 241, which was decided shortly after the Barnes Case, supra, it appears that the question

of the sufficiency of the information was not raised in the Appellate Court nor in this court until the filing of a reply brief pointing out that, under the Barnes Case, the information was insufficient. We there held that the judgment would be reversed even though the matter had never been called to the attention of this court until the filing of the reply brief."

The question of the unconstitutional invasion was raised several times throughout the trial by motion, and was again raised before the State Supreme Court.

III.

The Testimony of William Sinnott and Reuben Schuler in the Earlier Proceedings Introduced Over Objections at the Trial Was Inadmissible and in Contravention of Constitutional Rights.

A. Introduction of former testimony amounted to requiring the defendants to be witnesses against themselves in this criminal trial.

Not only were the rights of the Petitioners denied when they were subjected to the adverse examination, and the information was issued, but the introduction of testimony obtained at the adverse examination during the course of the trial was again a violation of the right against self-incrimination, an abridgment of the privileges and immunities of citizens of the United States, and also amounted to a deprivation of life, liberty and property without due process and equal protection of the laws. Even if it were assumed for the purposes of argument only that there was nothing inherently illegal in the questioning of Petitioners in the adverse examination in the civil cause, it is nevertheless submitted that any effort to introduce the testimony in these criminal proceedings

did at that point result in invasion of the constitutional right against self-incrimination. **Such testimony, when introduced at the trial, is in effect the same as calling the Petitioner as a witness against himself in the criminal proceeding without affording him the constitutional safeguards.** The Petitioners are thus required to incriminate themselves in the criminal prosecution on the basis of testimony compulsorily given in the civil proceedings and under circumstances where their constitutional rights were neither pointed out to them, nor was the right to assert such constitutional privilege made available to them or recognized.

B. **Because of coercive nature of earlier inquiry, testimony cannot be termed "voluntary."**

In this respect the introduction of testimony taken in the other proceedings cannot be compared to the introduction of voluntary confessions or admissions. Admissions or confessions are admissible where the accused is acting voluntarily and has been forewarned of his constitutional rights and advised of his privilege to remain mute. It must again be emphasized the Petitioners testified under compulsion of subpoena. Every scheme was used to disarm the Petitioners of the constitutional protection, and the testimony was extracted over objections invoking the constitutional privilege. Under such circumstances the testimony was clearly inadmissible.

It is a well-established rule that an admission should be free and voluntary. Admissions not free or voluntary by an accused have long been excluded from evidence at trials. Very early in our judicial history, it was held that the fact that an accused was examined on oath by a magistrate, or coroner, or by a grand jury, with or without an oath, per se, excluded admissions because of the

influence presumed to arise from the authority of the examining officer or body. **People v. McMahon** (1857), 15 N. Y. 384; **People v. Mondon** (1886), 103 N. Y. 211 at 218; **State v. Matthews** (1872), 66 N. C. 106; **Jackson v. State** (1879), 56 Miss. 311, 312; **State v. Clifford** (1892), 86 Iowa 550. This proposition was quoted with approval by this court in **Bram v. United States**, 168 U. S. 532.

In **State v. Perry**, So. Car., 91 S. E. 300, it was said:

> "It is essential to the admissibility of the admissions or conversations of a party charged with crime that they should be free and voluntary. Now when a person, though not at the time charged, or even suspected of a crime is summoned before a coroner's inquest, and compelled to testify (for the law does compel persons so summoned to testify) I do not see how such testimony can be regarded as such a free and voluntary statement as would justify receiving it in evidence. When the person so testifying is charged with a crime * * * the only way to preserve in its integrity the well-settled rule that a person cannot be required to furnish testimony against himself, is to hold that **if examined before a Coroner's jury or a committing magistrate the testimony which he is then required to give cannot be used against him in a prosecution subsequently brought against him.**" (Emphasis ours.)

Comparing these cases to the instant case the analogy will be seen. Petitioners appeared for the examination pursuant to a subpoena, they were sworn, their testimony was taken before no less a dignitary than a judge of the Circuit Court. All of these factors, and most urgently the force of the subpoena ordering them to appear and give testimony negate any motion that the testimony was given voluntarily.

In **Bram v. United States**, 168 U. S. 532, 42 L. Ed. 568, the prosecution sought to introduce into evidence, by a witness, statements made by the accused. The defense objected for these reasons: At the time the defendant was in the custody of the Chief of Police, the witness in an official capacity directed the police authorities to bring the defendant to his private office; while the accused was in the act of being stripped or when he had been stripped of his clothing, he was interrogated by the witness who was thus exercising complete authority and control of the person he was interrogating.

This court ruled:

> "Although these facts may not, when isolated each from the other, be sufficient to warrant the inference that an influence compelling a statement had been exerted, yet when taken as a whole, in conjunction with the nature of the communication made, they give room to the strongest inference that the statements of Bram were not made by one who in law could be considered a free agent. * * * A plainer violation as well of the letter as of the spirit and purpose of the constitutional immunity could scarcely be conceived of."

See also **Allen v. State**, 80 Tex. Criminal Reports 70, 188 S. W. 979.

Similarly, where the accused in a criminal proceeding chooses to remain silent, testimony which he has previously given, even though given voluntarily, may only be admitted for the purpose of impeachment, and defendant not having given any testimony, the earlier statements made by him at another trial are not admissible and their introduction into the Record is prejudicial error. In **Scherpig v. State**, 112 Tex. Criminal Reports 61, 13 S. W. (2nd) 872, it was held that testimony of an accused at a

former trial was not admissible where the accused did not testify.

C. **The use of compelled testimony is prohibited as well as compelling the self-incrimination.**

The constitution is violated not only when the testimony is coerced, the sin is equally as great when that same testimony is subsequently used by the prosecution to convict an accused. In **Feldman v. United States,** 322 U. S. 487, 88 L. Ed. 1408 (1944), the chief question was the admissibility of statements (made by the defendant in supplementary proceedings to discover assets subsequent to judgment in a civil case) in evidence in the trial of a criminal prosecution. After this court ruled that the evidence was admissible on the very narrow ground that the immunity pertains to a prosecution in the same jurisdiction and the evidence was obtained in a state proceeding, Justice Black had this to say in his Dissenting Opinion:

> "Compulsion of self-incriminatory testimony by court oaths and by the less refined methods of torture were equally detested by the Fifth Amendment's liberty-loving advocates and their forbears. Their abhorrence of these practices did not spring alone from a predilection for personal privacy. They had other reasons to despise and fear them. They still remembered the hated practices of the Court of Star Chamber, the Court of High Commission, and other inquisitorial agencies which had brought religious and political non-conformists within the penalties of the law by means of their own testimony. And history supports no argument that the framers of the Fifth Amendment were interested only in forbidding the **extraction** of an accused's testimony, as distinguished from the **use** of his extracted testimony. The extraction of testimony

is, of course, but a means to the end of its use to punish. Few persons would seriously object to testifying unless their testimony would subject them to future punishment. **The real evil aimed at by the Fifth Amendment's flat prohibition against the compulsion of self-incriminatory testimony was that thought to inhere in using a man's compelled testimony to punish him. By broadly outlawing the practice of compelling such testimony the Fifth Amendment struck at this evil at its source, seeking to eliminate the possibility that compelled testimony would ever be available for use to punish a defendant."** (Emphasis ours.)

See also **United States v. Burr**, (CC) Fed. Cas. No. 14,692e; **Counselman v. Hitchcock**, supra, pages 564-566; **Brown v. Walker**, 161 U. S. 591, 594, 600, 605, 606; **Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America**, 21 Va. L. Rev. 763.

Under any aspect, view or approach to the case, the introduction into the criminal proceedings of testimony taken in civil or other processes under the compulsion of subpoena, without affording to the accused either in those proceedings or in the instant proceeding, a constitutional right against self-incrimination results in fatal error and requires reversal of the convictions.

IV.

The Statutes of the State of South Dakota, as Construed by the Judgment of the Court Below, Are Unconstitutional Because They Violate the First and Fourteenth Amendments to the United States Constitution.

Section 1 of Chapter 45, Session Laws of South Dakota, 1941, and Section 13.1824, South Dakota Code, as con-

strued by the Judgment of Conviction in the proceedings below, are unconstitutional, in that said Judgment makes conduct on the part of the Petitioners, which is merely the exercise of the right of free speech, a violation of these Statutes, and hence an invasion of the guarantees of the First and Fourteenth Amendments to the United States Constitution. If indeed any conspiracy did occur, it was only a getting together to persuade peacefully and to carry out the legitimate activities of free American citizens—those activities which have been recognized as the expression of free men in the dissemination of their views on subjects vital to them. In a labor dispute such discussion between working men or between employees and an employer in an industry, and plans for such discussion are the foundation footings for ultimate success of the labor dispute.

The jury found that there was not sufficient evidence beyond a reasonable doubt that the Appellants had conspired to commit assault and battery as alleged in Count One of the Information (R. 197). The same facts which were necessary to support a finding of guilty of conspiracy to commit assault and battery are likewise necessary facts to establish the conspiracy to prevent employees from working. Referring to the testimony introduced over the objection of the defendants, which was sworn testimony taken from previous judicial proceedings, there is no evidence to indicate that there was anything unlawful about the conversations between the Petitioners, Sinnott and Schuler.

The testimony by Schuler is as follows (R. 52):

> Question: "As a result of that talk with him" (Sinnott) "what did you plan to do, or what were you instructed to do?"
>
> Answer: "William Sinnott told me about these boys.

He said there was this truck out, and he said will you take some man or two, who are reliable, with you and go down and see if you can talk to them and talk them out of operating and leave the freight set until the strike is over. * * *"

Question: "Were you instructed as to who you should take?"

Answer: "No, I wasn't."

Question: "Were you instructed as to how many to take?"

Answer: "No."

Question: "He said to pick a man or two to go with you?"

Answer: "Yes, he did, and I picked one man and there was some that volunteered."

Such a conversation was nothing more than a plan to engage in the exercise of free speech. To construe this as a conspiracy to use force, threats or intimidation can only be an illegal encroachment on that area of activities which in ordinary circumstances constitutes an exercise of freedom of speech. The right to influence by peaceful persuasion has long been sanctioned by the Supreme Court of the United States. The outstanding of these cases is **Thornhill v. State of Alabama,** 310 U. S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, decided in 1940, in which the court said:

"The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state.

"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the

processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgment of freedom of speech and of the press, however, impairs those opportunities for public education that are essential and effective exercise of the power of correcting error through the processes of popular government."

* * * * * * *

"In the circumstances of our times the designation of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution."

* * * * * * *

"The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview."

Senn v. Tile Layers Union, 301 U. S. 469;
American Federation of Labor v. Swing, 312 U. S. 321;
Carlson v. California, 310 U. S. 106;
Bakery and Pastry Drivers v. Wohl and Platzman, 315 U. S. 769;
Cafeteria Employees Union Local 302 v. Angelos, 320 U. S. 293;
Thomas v. Collins, 323 U. S. 516.

To use rough language in a labor dispute does not constitute a threat, force or coercion. In **Milk Wagon Drivers' Union v. Meadowmoor Dairies**, 312 U. S. 287, we find in the opinion of this Court at page 293,

> "And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force."

So the State should not be permitted to use the exhibitions of "animal exuberance" as revealed by the present Record to forge the peaceful conduct of the Petitioners into a pattern of coercion and threats. See also **Cafeteria Employees' Union v. Angelos**, supra, in which this Court said:

> "And to use loose language or undefined slogans that are part of the conventional give and take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsify facts."

There is nothing in the testimony which indicates that the alleged scheme of the defendants was to intimidate employees. If any force, coercion or violence was used in the persuasion of Porter B. Buckingham and Ralph Hancock, this was done at the instance of the prepetrator himself and not because of any design involving both defendants. The "intimidation" of the Statutes requires "force and coercion" involving or associated with violence or similar wrongful conduct per se. Peaceful persuasion is exempt and is not embraced within the term "force and coercion." If the statute constituting intimidation of employees is to be so construed as to make the peaceful persuasion of employees a violation of the Statute, then the Statute is void as contravening the First and Fourteenth Amendments to the Constitution of the United States. **Thornhill v. State of Alabama**, supra.

CONCLUSION.

This case is brought to the attention of this court principally because the lower courts have not recognized the unconstitutional invasion of the Petitioners' rights when testimony was compelled from them in the civil law suit, and introduced at the trial.

It is respectfully submitted that the convictions should not be sustained insofar as the Petitioners herein did only those things which were their right to do, and which are protected by the provisions of the Constitution of the United States.

It is further submitted that these entire proceedings should be reversed for the reason that

(1) the Petitioners were denied their constitutional rights against self-incrimination by their being called and by their being required to testify at the adverse examination;

(2) the information giving jurisdiction to the court was based upon an unconstitutional interrogation and therefore was invalid and should have been quashed;

(3) the testimony of William Sinnott and Reuben Schuler at the earlier proceedings introduced by the Court Reporter, over the objection of Counsel for the Petitioners, was inadmissible and its admission was in contravention of Petitioners' privileges against self-incrimination, and deprived them of immunities and privileges of American citizens, life, liberty and property without due process and equal protection of the laws;

(4) the Statutes of the State of South Dakota as construed by the Judgment of the courts below deprive the Petitioners of freedom of speech and the right to peace-

fully persuade their fellow workmen in violation of the First and Fourteenth Amendments to the Constitution of the United States.

Respectfully submitted,

HERBERT S. THATCHER and
ALFRED G. GOLDBERG,
Attorneys for Petitioners.

DAVID PREVIANT and
SAUL COOPER,
Of Counsel.

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Supreme Court Of The United States

OCTOBER TERM — 1947

NUMBER 773

WILLIAM SIEGOTT and EUGENE SCHULER,
Petitioners,

vs.

STATE OF SOUTH DAKOTA,
Respondents.

APPEAL FROM THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

RESPONDENT'S BRIEF

SIGURD ANDERSON
Attorney General

RAY P. DEEWRY
Assistant Attorney General

C. P. WARREN
Assistant Attorney General

Pierre, South Dakota

Attorneys for Respondent

SUBJECT INDEX

Supreme Court Of The United States

OCTOBER TERM — 1947

NUMBER -------

WILLIAM SINNOTT and RUEBEN SCHULER,
Petitioners,

-vs-

STATE OF SOUTH DAKOTA,
Respondents.

RESPONDENT'S BRIEF

I

STATEMENT DENYING JURISDICTION

It is the claim of the petitioners that the record shows that at the trial of this case in the Circuit Court of South Dakota, they were deprived of certain constitutional rights which were guaranteed by the Constitution of the United States. The specific constitutional provisions invoked by their petition for Writ of Certiorari involves the First, Fifth and Fourteenth Amendments to the Constitution.

The First Amendment provides that Congress "shall make no law***abridging the freedom of speech***."

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property without due process of law***."

The Fourteenth Amendment provides: "nor shall any state deprive any person of life, liberty or property without due process of law."

It is the claim of Respondents that the Petition for the Writ does not present a controversy over which this court has jurisdiction. No Federal question is presented. Particularly the Petition does not present a controversy arising un-

der the First, Fifth, or Fourteenth Amendments for the following reasons:

The claim of Petitioners that their right of free speech guaranteed by the First Amendment was made for the first time in this court in their Petition for the Writ. No such claim was made in any manner or at any time at the trial in the Circuit Court, by any motion, objection or otherwise, and therefore no ruling of the trial court was made thereon. Neither was any such claim made by Petitioners in their appeal to the Supreme Court of South Dakota, by appropriate Assignment of Error or otherwise. Consequently, there was no decision of the State Court in relation thereto which can be brought here for review.

The provisions of the Fifth Amendment to the Constitution protecting a defendant from self-incrimination have no application to states or state courts. This amendment is one of the first ten amendments to the Federal Constitution which are known as the Bill of Rights. It has uniformly been held by this court in a long line of decisions that the Bill of Rights was a limitation on Federal Courts but did not place limitations on the power of State courts, except as they may have been made subject thereto in certain cases by the Fourteenth Amendment.

This distinction as to State and Federal Courts is stated in the text of 11 Am. Jur. Constitutional Law, Section 310, as follows:

> "The extent of the operation of the Federal Bill of Rights is well settled. Since the Constitution of the United States only takes from the states for Federal exercise enumerated express powers and those necessarily implied and, moreover, since the states are left with all powers of sovereignty the exercise of which is not expressly forbidden, the limitations that the Constitution of the United States imposes upon the powers of government are upon the government of the Union only, except where the states are expressly mentioned. In the application of this doctrine specifically to the guaranties contained in the Federal Bill of Rights, it has been held since the early days of our

constitutional history that the First Ten Amendments or, as some of the authorities more accurately put it, the First Eight Amendments, forbid the abridgment only by acts of Congress or the United States Government, its agencies and departments, of the rights therein guaranteed, and do not apply to acts of the states." states."

In the case of Ensign v. Pennsylvania, 227 U.S. 502, 57 L. Ed. 658, this court held that the governments of the several states or their judicial establishments are not obliged to accord the privilege against self-incrimination afforded by the United States Constitution, Fifth Amendment, but that this amendment regulates the procedure of the Federal Courts only. The court said:

> "Article 5 of Amendments to the Federal Constitution is invoked, which provides that 'No person*** shall be compelled in any criminal case to be a witness against himself; but as has been often reiterated, this amendment is not obligatory upon the governments of the several states or their judicial establishments and regulates the procedure in the Federal courts only."

In the recent case of Adamson v. California, 332, U.S. 46; 91 L. Ed. 1903, (1947), this court held that the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself is not made effective by the Fourteenth Amendment as a protection against state action on the ground that freedom from testimonial compulsion is a right of national citizenship, or because it is a personal privilege or immunity secured by the Federal Constitution as one of the rights of man that are listed in the Bill of Rights. The court said:

"It is settled law that the clause of the Fifth Amendment protecting a person against being compelled to be a witness against himself is not made effective by the Fourteenth Amendment as a protection against State action on the ground that freedom from testimonial compulsion is a right of national citizenship or because it is a personal privilege or immunity secured by the Federal Constitution

as one of the rights of man that are listed in the Bill of Rights.

The reasoning that leads to those conclusions starts with the unquestioned premise that the Bill of Rights when adopted was for the protection of the individual against the Federal Government and its provisions were inapplicable to similar actions done by the state."

Respondents, therefore respectfully urge that the record fails to present for review a case arising under the First, Fifth or Fourteenth Amendments and that this court is without jurisdiction to hear this appeal.

II

THE RECORD HEREIN PRESENTS NO QUESTION UNDER THE FIFTH AMENDMENT, EVEN IF THE FIFTH AMENDMENT SHOULD BE HELD TO APPLY.

Section 9 of Article 6 of the Constitution of South Dakota provides "that no person shall be compelled in any criminal case to give evidence against himself**," and this provision of the South Dakota Constitution was also invoked by Petitioners in their trial in Circuit and Supreme Courts of South Dakota.

The testimony which Sinnott claims he was compelled to give in violation of his constitutional rights is found at pages 54 and 55 of the printed Record herein. This testimony of Sinnott was given originally by him in a civil action pending in the Circuit Court in Pennington County in which the Petitioners here and others were Defendants. This evidence became a part of the record in this case by the testimony of the witness Fliday who was the official court reporter at the trial of both cases. This civil action was entitled Porter Buckingham, Plaintiff, -vs- William Sinnott, Rueben Schuler, et al, Defendants. While the nature of this civil action is not directly shown by the record, it may probably be assumed that it was a damage suit brought by the plaintiff against defendants arising out of the assault of Porter Buckingham, plaintiff, which is the assault involved in the present case. It affirmatively appears

from the record that the defendant, Sinnott, was called by the plaintiff as an adverse witness in the civil proceedings and that he was represented by counsel during his adverse examination. No claim of privilege was made by him or by his attorney at the time he was called or at the time he testified. The testimony that he gave is shown at pages 54 and 55 of the printed Record herein as follows:

Q. I will ask you, Mr. Fliday, if in the examination of William Sinnott the following questions were put to Mr. Sinnott and the following answers given by Mr. Sinnott: Question, "Who did you learn about the carload of boys going down to Wall from?" Answer, "I asked Schuler myself to go down to Wall to see if Hancock (fol. 88) was driving the truck and ask him not to continue driving it. I didn't know that Porter was driving that truck." Question, "You asked him before he went down to Wall?" Answer, "I asked Schuler to go; yes." Question, "When did you ask him to do that?" Answer, "When I found out that the truck had gone east that evening." Were those questions put to Mr. Sinnott and those answers given by Mr. Sinnott, Mr. Fliday?

A. Yes, sir, they were.

Mr. Bottum: That's all.

It does not appear that this testimony was elicited by compulsion or that it was incriminating. The first question asked the witness could have been answered by giving the name of the person inquired about in the question. The additional evidence given in the answer to the first question was wholly voluntary on the part of the witness. We urge that such voluntary testimony was not compulsory and was not incriminating. The privilege of silence protected by the constitutional provisions is for the benefit of the witness and is deemed to be waived unless invoked and a witness who claims that privilege can not testify and then contend that he is deprived of his constitutional rights. It is the right of the plaintiff in a civil action to call the defendant as a witness and interrogate him until the privilege is exercised. Wigmore on Evidence, 3rd Ed. 2268.

Apparently, Petitioners do not question the above

rule, but claim an exception here for the reason that the civil action was brought for the purpose of securing evidence to convict the defendant in a later criminal action. We urge that this claim finds no support in the record here.

For all the reasons herein urged, the Petition for Writ of Certiorari filed by the Petitioners herein should be denied.

Respectfully submitted,

SIGURD ANDERSON
Attorney General

RAY F. DREWRY
Assistant Attorney General

C. P. WARREN
Assistant Attorney General

Pierre, South Dakota

Attorneys for Respondent